Shim Tshun Fatt v Public Prosecutor

HIGH COURT (SANDAKAN) — CRIMINAL APPEAL NO S41–11 OF 2000
RICHARD MALANJUM J
2 OCTOBER 2000

Criminal Procedure *— Jurisdiction of court — Magistrate's court — Whether magistrate has jurisdiction to hear criminal prosecution under s 58(1)(b) of Immigration Act 1959/63 — Subordinate Courts Act 1948 ss 85 & 111*

The issue in this appeal was whether the magistrate has the jurisdiction to hear a criminal prosecution under s 58(1)(b) of the Immigration Act 1959/63 ('the Act') for an offence under s 56(1)(d) of the Act. The appellant contended that the magistrate has no jurisdiction in view of s 111 of the Subordinate Courts Act 1948 ('the 1948 Act'). The respondent submitted that s 85 of the 1948 Act allows the magistrate's court to try the case and that s 58 of the Act does not bar the magistrate from trying the case if the case is filed and registered in the magistrate's court.

Held:

(1) Section 58(1)(b) of the Act provides that in Sabah the offences under the Act are cognizable by a court of first class magistrate. Hence the question was whether the prescribed court should now be read as sessions court owing to s 111 of the 1948 Act. On a literal reading of s 58(1)(b) in the context of s 111, it is clear that it is the intention of the legislature to substitute the court which should have jurisdiction to hear offences under the Act (see pp 45H–46A).

(2) Section 85 of the 1948 Act could not be interpreted as to give a court of a magistrate of first class the jurisdiction to hear cases under the Act without due regard to the provision of s 111 thereof. Section 111 is intended as an amending section thereby substituting the phrase, inter alia, 'a court of a first class magistrate' with the phrase 'a sessions court' in any statute that has been in force in Sabah prior to 1 June 1981 (see pp 46D–E).

(3) The phrase 'shall be cognizable' in s 58 of the Act indicates the jurisdiction bestowed upon a court of a magistrate of the first class. But that was not the issue. It is the amending effect of s 111 to s 58 in that the phrase 'a court of a first class magistrate' found therein should thereafter be read as 'a sessions court'. On plain and literal reading of s 111, it is obvious that the intention therein is to amend or substitute for 'the court of a magistrate of the first class' with 'a sessions court'. The court found no ambiguity in that section. Thus the court ruled that the magistrate court that heard the charge preferred against the appellant has no

jurisdiction to hear it and the trial so far heard was a nullity (see pp 46H–47A, D).

[**Bahasa Malaysia summary**

Isu di dalam rayuan ini adalah sama ada majistret mempunyai bidang kuasa membicarakan pendakwaan jenayah di bawah s 58(1)(b) Akta Imigrasi 1959/63 ('Akta tersebut') bagi satu kesalahan di bawah s 56(1)(d) Akta tersebut. Perayu mengemukakan hujah bahawa majistret tersebut tidak mempunyai bidang kuasa menurut s 111 Akta Mahkamah Rendah 1948 ('Akta 1948 tersebut'). Responden mengemukakan hujah bahawa s 85 Akta 1948 tersebut mengizinkan mahkamah majistret membicarakan kes tersebut dan s 58 Akta tersebut tidak menghalang majistret daripada membicarakan kes tersebut jika kes tersebut difailkan dan didaftar di mahkamah majistret.

Diputuskan:

(1) Seksyen 58(1)(b) Akta tersebut menyatakan bahawa di Sabah kesalahan di bawah Akta tersebut boleh diambil tahu oleh mahkamah majistret kelas pertama. Oleh itu, persoalannya adalah sama ada mahkamah yang ditetapkan patut difahami sekarang sebagai mahkamah sesyen disebabkan s 111 Akta 1948 tersebut. Tafsiran harfiah (literal) s 58(1)(b) dalam konteks s 111 menunjukkan dengan jelas bahawa badan perundangan memang berniat menggantikan mahkamah yang mempunyai bidang kuasa membicarakan kesalahan di bawah Akta tersebut (lihat ms 45H–46A).

(2) Seksyen 85 Akta 1948 tersebut tidak boleh ditafsirkan agar memberikan mahkamah majistret kelas satu bidang kuasa membicarakan kes-kes di bawah Akta tersebut tanpa mempertimbangkan provisi s 111. Seksyen 111 berperanan sebagai seksyen pindaan yang menggantikan frasa 'suatu mahkamah majistret kelas pertama' dengan frasa 'suatu mahkamah sesyen' di dalam mana-mana statut yang berkuasa di Sabah sebelum 1 Jun 1981 (lihat ms 46D–E).

(3) Frasa 'patut difahami' dalam s 58 Akta tersebut menunjukkan bidang kuasa yang ada pada mahkamah majistret kelas pertama. Tetapi ini bukan persoalannya. Kepentingannya ialah kesan pindaan s 111 ke atas s 58 yang menyebabkan frasa 'suatu mahkamah majistret kelas pertama' kini difahami sebagai 'suatu mahkamah sesyen'. Tafsiran harfiah s 111 menunjukkan dengan jelas sekali niat undang-undang adalah untuk meminda atau menggantikan frasa 'suatu mahkamah majistret kelas pertama' dengan 'suatu mahkamah sesyen'. Mahkamah tidak menghadapi keraguan dalam seksyen tersebut. Oleh itu, mahkamah mendapati bahawa mahkamah majistret yang membicarakan dakwaan

perayu tersebut tidak mempunyai bidang kuasa dan perbicaraan setakat ini tidak sah (lihat ms 46H–47A, D).] A

Notes

For cases on criminal jurisdiction of magistrate's court, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1723–1761. B

Cases referred to

Canada Sugar Refining Co Ltd v R [1898] AC 735 (refd)
Lee Ngak Piew v PP [1999] 3 CLJ 841 (refd)
Madanlal Fakirchand Dudhediya v Shree Changdeo Sugar Mills Ltd & Ors 1962 AIR SC 1543 (refd) C
PP v Chang Han Yuan [1999] 4 MLJ 49 (refd)
PP v Dato Yap Peng [1987] 2 MLJ 311 (refd)
Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara, Malaysia & Anor [1999] 2 MLJ 241 (refd)

D

Legislation referred to

Immigration Act 1959/63 ss 56(1)(d), (b)
Subordinate Courts Act 1948 ss 85, 111

Appeal from: Criminal Case No 83–471 of 1999 (Magistrate's Court, Sandakan) E

David Wong (*Peter Lo & Co*) for the appellant.
Nor Aini bte Zulkifli (Attorney General's Chambers) for the respondent.

Richard Malanjum J: F

Preliminary

On 28 September 2000, I delivered my oral judgment allowing this appeal of the appellant and further held that it would be up to the prosecution on what to do next in so far as it relates to the allegation against the appellant. I also said that I would give my grounds later. I do so now. G

To begin, this is an appeal by the appellant in relation to the issue of jurisdiction of the learned magistrate to hear a criminal prosecution under s 58(1)(b) of the Immigration Act 1959/63 ('the said Act') for an offence under s 56(1)(d) of the said Act. The learned magistrate had earlier on ruled that there was a prima facie case against the appellant on the charge preferred. H

The charge

The original charge preferred against the appellant reads: I

Bahawa kamu, pada 23 November 1999 lebih kurang jam 11.30 pagi, bertempat di Pelabuhan Karamunting, di dalam daerah Sandakan, di dalam Negeri Sabah, dengan sengaja telah melindungi:

(1) Lee Miguel (L) 50 tahun PI.

(2) Jenie Sellona (P) 21 tahun PI.

(3) Maria Cecilia Flores (P) 23 tahun PI.

(4) Leah Ancheta (P) 21 tahun PI.

dengan mempunyai alasan yang munasabah untuk mempercayai bahawa mereka bukan warganegara Malaysia dan telah membantu mereka untuk meninggalkan tempat pemeriksaan di Pos Kawalan Imigresen, di Pelabuhan Karamunting tanpa kebenaran Pegawai Imigresen, sepertimana mereka dikehendaki berbuat demikian mengikut peruntukan di bawah s 24(2)(a) Akta Imigresen 1959/63, oleh yang demikian kamu telah melakukan satu kesalahan di bawah s 56(1)(d) Akta Imigresen 1959/63 dan kamu boleh dihukum di bawah s 57 Akta yang sama Undang-Undang Malaysia.

It was subsequently amended by the presiding magistrate to read as follows:

Bahawa kamu, pada 23 November 1999 lebih kurang jam 11.30 pagi bertempat di Pelabuhan Karamunting di dalam daerah Sandakan di dalam Negeri Sabah telah membantu (abets):

(1) Lee Miguel (L) 50 tahun PI;

(2) Jenie Selona (P) 21 tahun;

(3) Maria Cecilia Flores (P) 23 tahun; dan

(4) LeaAncheta (P) 21 tahun

melakukan kesalahan dibawah s 6 Akta Immigration dan oleh yang demikian adalah kamu telah melakukan kesalahan dibawah s 56(1A)(c) Akta Immigration dan boleh dihukum di bawah s 57 Akta yang sama.

At the end of the prosecution case, learned counsel for the appellant submitted several points, inter alia, that the learned magistrate lacked the jurisdiction to hear the case under s 58(1)(b) of the said Act. Nevertheless the learned magistrate overruled such point and proceeded to find a prima facie case for the appellant to answer on the charge preferred.

The grounds of appeal

In the petition of appeal, it is stated thus:

(a) that the learned magistrate erred in law in holding that a challenge to the court's jurisdiction must be made at the beginning of the trial;

(b) that the learned magistrate erred in law in failing to distinguish the case of *PP v Chang Han Yuan* [1999] 4 MLJ 49, which concerns s 3(1) of the Women and Girls Protection Act from the present case which concerns s 58(1)(b) of the Immigration Act;

(c) that the learned magistrate erred in law in placing erroneous emphasis on the word 'cognizable';

(d) that the learned magistrate erred in law in misconstruing the interpretation of s 58(1) and (3) of the Immigration Act;

(e) that the learned magistrate erred in law in failing to appreciate the significance of s 58(1) in that s 58(1)(a) provides jurisdiction in West Malaysia to two courts, namely the session court and a court of first class magistrate while in East Malaysia, s 58(1)(b) provides jurisdiction to only the first class magistrate.

(f) By reasons of the aforesaid grounds, the learned magistrate erred in law in holding that he had the jurisdiction to hear the present case under s 58(1)(b) of the Immigration Act.

The contentions

For the appellant it was argued, inter alia, that the learned magistrate erred in not accepting the objection as to his jurisdiction to hear the case under s 58(1)(b) of the said Act in view of s 111 of the Subordinate Courts Act 1948 ('the 1948 Act'). And it was submitted that the said Act was extended to Sabah prior to 1 June 1981, that is the date of extension of the 1948 Act. Hence, s 111 applies to the said Act.

For the respondent it was submitted, inter alia, that:

(i) Section 85 of the 1948 Act allows the magistrate court to try the present case in view of the maximum punishment provided for the offence upon which the appellant is charged;

(ii) the words 'shall be cognizable' in s 58 of the said Act read together with s 111 of the 1948 Act should be interpreted as making it permissible and mandatory for the sessions court to try those Immigration cases filed and registered in the sessions court. However, it does not bar the magistrate from trying the case if the case is filed and registered in the magistrate's court and any court for that matter. Any ouster of a court's jurisdiction must be on unequivocal terms, and

(iii) the intention of Parliament in incorporating such provisions in the various Acts was never meant to bar such cases but only meant to emphasize and reiterate that the sessions court has jurisdiction in those cases irrespective of whether the maximum term of imprisonment was within the jurisdiction of the magistrate's court. But once filed and registered in the magistrate's court the prosecution will have to be content with the limited punishment that the magistrate's court may impose in accordance with law.

The relevant statutes

Section 58 of the said Act reads:

Trial of offences

(1) All offences against this Act shall be cognizable —

(a) in West Malaysia, by a Sessions Court and by a Court of a First Class Magistrate; and

(b) in East Malaysia, by a Court of a First Class Magistrate.

(2) No prosecution shall be instituted in respect of any offence against this Act without the sanction in writing of the Director General or of the Public Prosecutor or his Deputy:

Provided that nothing herein shall prevent any police officer or immigration officer from exercising his powers to arrest or detain any person under this Act.

A (3) In West Malaysia any Sessions Court or Court of a First Class Magistrate and in East Malaysia any Court of a First Class Magistrate may notwithstanding anything in the Subordinate Courts Act 1948, the Sabah Criminal Procedure Code or the Sarawak Criminal Procedure Code, as the case may be, impose the full punishment prescribed for any offence except that the Court of a Magistrate other than a Stipendiary Magistrate in East Malaysia shall not impose a sentence of mprisonment for a term exceeding 12 months.

Section 56(1)(d) of the said Act provides:

Offences

(1) Any person who —
(a) (Repealed);
(b) (Repealed);
(c) (Repealed);
(d) harbours any person whom he knows or has reasonable grounds for believing to have acted in contravention of this Act;

Section 85 of the 1948 Act provides:

Subject to limitations contained in this Act a First Class Magistrate shall have jurisdiction to try all offences for which the maximum term of imprisonment provided by law does not exceed ten years imprisonment or which are punishable with fine only and offences under ss 392 and 457 of the Penal Code (FMS Cap 45).

And s 111 of the 1948 Act states:

Where in any written law passed or made before the commencement of the extension of this Act to Sabah and Sarawak, there is, in relation to Sabah or Sarawak —

(a) a reference to the Court of a Magistrate of the First Class or a District Court there shall be substituted a reference to a Sessions Court;
(b) a reference to the court of —
(i) a magistrate of the Second Class, a Police Court or Court of Small Causes;
(ii) a magistrate of the Third Class or a Petty Court, there shall be substituted a reference to a magistrates' Court;
(c) a reference to a Stipendiary Magistrate or a magistrate of the First Class there shall be substituted a reference to a Sessions Court Judge; and
(d) a reference to a magistrate of the Second Class or a magistrate of the Third Class there shall be substituted a reference to a Second Class Magistrate.

Findings

There is no doubt here that the said Act was in fact in force in Sabah prior to 1 June 1981. There is also no doubt that s 58(1)(b) thereof provides that in Sabah the offences under the said Act are cognizable by a court of a first class magistrate. Hence the question is whether the prescribed court should now be read as sessions court owing to s 111 of the 1948 Act.

On a plain or literal reading of s 58(1)(b) in the context of s 111, it is clear that it is the intention of the legislature to substitute the court which

should have jurisdiction to hear offences under the said Act. I cannot envisage any other purpose in legislating s 111 other than the foregoing preposition. However such effect is only on those statutes that are already in force in Sabah prior to 1 June 1981.

The learned deputy referred to s 85 of the 1948 Act to say that indeed a court of a magistrate of the First Class has jurisdiction to hear offences under the said Act in view of the punishment such court can impose.

With respect, to take such a stand, it is essential that that section is to be read in isolation. But that should not be the case (see *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara, Malaysia & Anor* [1999] 2 MLJ 241).

It is also a canon of statutory construction that a statute should be read as a whole. Each clause in a statute is to be 'construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute': per Lord Davey in *Canada Sugar Refining Co Ltd v R* [1898] AC 735 at p 741 (see also *Madanlal Fakirchand Dudhediya v Shree Changdeo Sugar Mills Ltd & Ors* 1962 AIR SC 1543).

As such, I do not think that s 85 of the 1948 Act can be interpreted as to give a court of a magistrate of first class the jurisdiction to hear cases under the said Act without due regard to the provision of s 111 thereof. Indeed I note that s 111 comes under the sub-heading of an amending section. In fact, that section is not so much involved with any other question such as the power of sentencing as s 85 may have been intended; rather it is intended as an amending section thereby substituting the phrase, inter alia, 'a court of a first class magistrate' with the phrase 'a sessions court' in any statute that has been in force in Sabah prior to 1 June 1981.

Section 85 is also preceded by the phrase 'Subject to limitations contained in this Act thereby indicating that it is not a section to stand on its own. Of course it is also possible to say that the word limitations thereto only deals with the power of sentencing and such other limitations contained in the 1948 Act before the insertion of s 111 thereof. But to do that would tantamount to isolating or limiting the latter section for a specific purpose. I do not think that is in line with the rule of statutory construction. In any event that would have been spelt out in the first instance. Accordingly, I would think that s 111 is also a limitation to s 85.

As for the other contentions of the learned deputy in that s 111 should not be interpreted to mean that it has barred a court of a magistrate of the First Class but that it only gives jurisdiction to the sessions court if such case is registered therein, I doubt the merit of such argument. In the first place the phrase 'shall be cognizable' in s 58 of the said Act does indicate the jurisdiction bestowed upon a court of a magistrate of the First Class. But in my view, that is not the issue. It is the amending effect of s 111 to s 58 in that the phrase 'a court of a first class magistrate' found therein should thereafter be read as 'a sessions court'. As such, the presence of that phrase as highlighted by learned deputy is quite irrelevant to the issue at hand.

As regards the submission that for s 111 to override the jurisdiction of the court of a magistrate of the first class, the intention of Parliament should

be clear and unambiguous while in the present case it is not so, with respect I am unable to accept such contention. On a plain and literal reading of s 111, it is obvious that the intention therein is to amend or substitute for 'the court of a magistrate of the first class' with 'a sessions court'. Hence, I find no ambiguity in that section.

There was also reference to cases which dealt with the issue of jurisdiction of the court of a magistrate of the first class but they were considering a different statute, namely, the Women and Girls Protection Act 1973 (see *PP v Chang Han Yuan* [1999] 4 MLJ 49; *Lee Ngak Piew v PP* [1999] 3 CLJ 841).

The respective decisions of the High Courts involved thereof were in conflict and having read the judgments in both cases I am inclined to agree with the latter case. In any event, I do not think these cases are of much help in that they do not deal with s 111 of the 1948 Act.

In the upshot, this appeal should therefore be allowed, in that I rule that the court of the magistrate of the first class that is presently hearing the charge preferred against the appellant has no jurisdiction to hear it and that the trial so far heard is a nullity (see *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 MLJ 266; *PP v Rajappan* [1986] 1 MLJ 152).

In coming to the decision, as I did, I was conscious of the ramification since there could have been similar cases dealt with by the magistrate court of the first class in previous instances. I am also quite sure that there must be similar cases registered and pending for disposal thereat. The question now is to determine the fate of those cases and those that had already been disposed of.

In *PP v Dato Yap Peng* [1987] 2 MLJ 311, the doctrine of prospective overruling was applied in that in cases which had already been settled through acquittals or convictions they need not be disturbed. That is quite different from the pending case.

Having therefore considered this matter before me and in view of the conclusion that I have arrived at, I think the most appropriate step to take is to apply the doctrine of prospective overruling in that cases which had already been dealt with and completed need not be disturbed. However cases which are yet to be determined should be sent to or re-registered with the appropriate court.

In other words, cases involving statutes affected by s 111 of the 1948 Act, registered and pending in the court of a magistrate of the first class when this decision was delivered would have to recommence all over again.

Order accordingly.

Reported by Jafisah Jaafar